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Immigration, Civil Rights, and Coalitions for Social Justice

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In the face of persistent attacks in the popular press, as well as academia, the critical study of the impact of race on the social fabric of the United States continues. Immigration law historically has been considered a specialty area of practitioners spurned by academics. However, the treatment of "aliens," particularly noncitizens of color, under the U.S. immigration laws reveals volumes about domestic race relations in the nation. A deeply complicated, often volatile, relationship exists between racism directed toward citizens and that aimed at noncitizens. Typical of these uncivil times for civil rights, Peter Brimelow's best-selling anti-immigrant book, *Alien Nation: Common Sense About America's Immigration Disaster*, exemplifies this relationship; while ostensibly criticizing the state of U.S. immigration law, Brimelow attacks affirmative action, "Hispanics," multiculturalism, bilingual education, and virtually any program designed to remedy discrimination in the United States.[1] Arthur Schlesinger's *The Disuniting of America: Reflections on a Multicultural Society* plays on similar fears.[2]

As the legacy of chattel slavery and forced migration from Africa would have it, the United States has a long history of treating racial minorities in this country harshly, at times savagely. Noncitizen racial minorities, as foreigners not part of the national community, generally have been subject to similar, although not identical, cruelties but also have suffered deportation, indefinite detention, and more. The differential treatment is permitted, if not encouraged, by the disparate bundles of legal rights afforded domestic and noncitizen minorities.

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1. PETER BRIMELOW, ALIEN NATION: COMMON SENSE ABOUT AMERICA'S IMMIGRATION DISASTER (1995).

2. ARTHUR M. SCHLESINGER, JR., THE DISUNITING OF AMERICA: REFLECTIONS ON A MULTICULTURAL SOCIETY (rev. ed. 1998).

Rather than just a peculiar feature of U.S. public law, the differential treatment of citizens and noncitizens serves as a "magic mirror" revealing how dominant society might treat domestic minorities if legal constraints were lifted. Indeed, the harsh treatment of noncitizens of color reveals terrifying lessons about how society in fact views its citizens of color. For example, the era of exclusion of Chinese immigrants in the 1800s occurred simultaneously with punitive, often violent, action directed at the Chinese on the West Coast.[3] Efforts to exclude and deport Mexican immigrants from the United States, which accelerated over the course of the twentieth century, tell much about how society generally perceives Mexican American citizens.[4] Similarly, the extraordinarily harsh policies directed in the 1980s and 1990s toward poor Haitians seeking refuge from violent political and economic turmoil in Haiti, leave little room for doubt—if there were any—about how this society as a whole views its own poor Black population.[5]

Oddly enough, even while the attacks on immigrants of color are pervasive, some informed observers claim that racism is a historical artifact in the United States, or at least has greatly diminished as a driving force behind policymaking as the twentieth century came to a close. Based in part on this premise, political forces attack affirmative action, multiculturalism, language minorities, and ameliorative programs created in response to the civil rights struggles of the 1960s. At the same time, Congress, with minimal resistance, passed two harsh—some say draconian—immigration laws and a tough welfare "reform" law in 1996, in the name of fighting a range of perceived social ills from welfare fraud to crime to terrorism to "illegal" immigration.[6] Under these laws, noncitizens became subject to indefinite detention, were denied

3. *See generally* ROGER DANIELS, ASIAN AMERICA 9-99 (1988) (documenting anti-Asian agitation in California); ELMER CLARENCE SANDMEYER, THE ANTI-CHINESE MOVEMENT IN CALIFORNIA (2d. ed. 1991) (same).

4. *See, e.g.*, JUAN RAMON GARCÍA, OPERATION WETBACK (1980) (analyzing removal campaign known as "Operation Wetback" in 1954 in which thousands of persons of Mexican ancestry were deported from the United States).

5. *See* Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155 (1993) (upholding federal governments interdiction and repatriation policy directed at Haitians).

6. *See, e.g.*, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (limiting immigration and facilitating deportation of noncitizens in a number of ways) [hereinafter IIRIRA]; Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (restricting the receipt of public benefits by legal immigrants); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (providing, *inter alia*, that noncitizens convicted of criminal offenses would receive limited or no judicial review of deportation orders and creating a special tribunal responsible for deporting so-called terrorists).

judicial review of deportation orders, and found themselves ineligible for major federal public benefit programs. It is no coincidence that anti-immigrant sentiment caught fire in tandem with the anti-minority backlash in the 1990s.

The harsh treatment of noncitizens reveals just how this society views citizens of color. As psychological theory suggests, the virulent attacks on noncitizens in effect represent transference and displacement of animosity for racial minorities generally. Because direct attacks on minorities on account of their race is nowadays taboo, frustration with domestic minorities often is displaced to foreign minorities. A war on noncitizens of color focusing on their immigration status, not race, as conscious or unconscious cover, serves to vent social frustration and hatred. The end result is that animosity for domestic minorities is displaced to a more publicly palatable target for antipathy. These psychological devices help society reconcile the view that "U.S. society is not racist" with the harsh treatment of noncitizens, the vast majority of whom are people of color. Noncitizens, so the story goes, deserve different treatment because of their immigration status, not race. This is said to constitute legally permissible discrimination against noncitizens and outsiders to the community, not invidious racism that runs afoul of the law.

The connection between civil rights and immigration, and thus the struggles of noncitizens and citizens, has important implications for the quest for social justice. Common interests create the potential for alliances among Asian Americans, Latina/os, and African Americans, as well as other groups. Such coalitions are particularly necessary in these times. They are essential to avoid the harsh punishment of certain communities, while others see minimal, often illusory, benefits. Unless racial justice and immigrants rights activists work together, we can expect a "divide and conquer" strategy to the detriment of all people of color, immigrants and citizens alike. History teaches that, even if one group obtains formal legal rights, absent the support of a broad-based, mobilized political coalition, the law ultimately will prove to be unenforceable. Concerted action is the only viable remedy.

The History of Racial Exclusion in the U.S. Immigration Laws

Racism, along with nativism, economic, and other social forces, has unquestionably influenced the evolution of immigration law and policy in the United States. It does not exist in a social and historical vacuum. Foreign and domestic racial subordination are instead inextricably linked.

From Chinese Exclusion to General Asian Subordination

The horrendous treatment of Chinese immigrants in the 1800s by federal, state, and local governments, as well as by the public at large, represents a bitter underside to U.S. history. Culminating in the federalization of immigration regulation, Congress passed the infamous Chinese exclusion laws barring virtually all immigration of persons of Chinese ancestry and severely punishing Chinese immigrants who violated the harsh laws.[7] Discrimination and violence, often rooted in class conflict as well as racist sympathies, directed at Chinese immigrants already in the United States, particularly in California, fueled passage of the laws. The efforts to exclude future Chinese immigrants from our shores were linked to the deeply negative attitude toward Chinese persons already in the country.[8]

The Supreme Court emphasized national sovereignty as the rationale for not disturbing the laws excluding the "obnoxious Chinese" from the United States.[9] In the now-infamous *Chinese Exclusion Case*, the Supreme Court enunciated the "plenary power" doctrine affording Congress absolute authority—denoted "plenary power"—over immigration and stated that "[t]he power of exclusion of foreigners [is] an incident of sovereignty belonging to the government of the United States, as a part of sovereign powers delegated by the Constitution."[10] Similarly, in *Fong Yue Ting v. United States*, the Court reasoned that "[t]he right of a nation to expel or deport foreigners . . . is as absolute and unqualified as the right to prohibit and prevent their entrance into the country."[11]

Congress later extended the Chinese exclusion laws to bar immigration from other Asian nations and to prohibit the immigration of persons of Asian ancestry from any nation. The so-called Gentleman's Agreement between the U.S. and Japanese governments in 1907-08 greatly restricted immigration from Japan.[12] The Immigration Act of 1917 expanded Chinese exclusion to

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7. *See* Wong Wing v. United States, 163 U.S. 228, 233 (1896) (invalidating law providing that a Chinese immigrant unlawfully in the country "shall be imprisoned [without a jury trial] at hard labor").

8. For analysis of the history, *see* BILL ONG HING, MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY, 1850-1990, at 44-53 (1993); LUCY E. SALYER, LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW (1995); RONALD TAKAKI, STRANGERS FROM A DIFFERENT SHORE 79-130 (1989).

9. Fong Yue Ting v. United States, 149 U.S. 698, 743 (1893) (Brewer, J., dissenting).

10. Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 609 (1889).

11. 149 U.S. at 707.

12. *See* DANIELS, *supra* note 3, at 123-28.

prohibit immigration from the "Asiatic barred zone."[13] A 1924 law, best known for creating the discriminatory national origins quota system, allowed for the exclusion of noncitizens "ineligible to citizenship," which disparately affected Asian immigrants who as non-Whites were prohibited from naturalizing.[14] During the same era, many states enacted "alien land" laws that effectively barred Asian immigrants from owning certain real property.[15]

Chinese Exclusion and Reconstruction

Historically, an inverse relationship often has existed between the legal treatment of different racial minorities in the United States. Consider the relationship between the treatment of the Chinese and African Americans in the nineteenth century. Congress passed the first wave of discriminatory immigration laws not long after the Fourteenth Amendment, which bars states from denying any person equal protection of law, and the other Reconstruction Amendments went into effect.[16] With the harshest treatment generally reserved for African Americans formally declared unlawful, the nation transferred animosity to another discrete and insular racial minority whose immigration status, combined with race, made such treatment more legally defensible as well as socially acceptable.[17] For example, in the congressional debates over ratification of the Fourteenth Amendment, a member of Congress declared that Chinese persons could be treated less favorably than African Americans because "[the Chinese] are foreigners and the Negro is a native."[18]

The relationship between Chinese exclusion and the revolutionary improvements for African Americans during Reconstruction generally has gone ignored, even though pre-Civil War state laws regulating the migration of slaves served as models

13. Ch. 29, § 3, 39 Stat. 874, 875-76 (repealed 1952).

14. Immigration Act of 1924, ch. 190, § 11(d), 43 Stat. 153, 159 (repealed 1952). *See generally* IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1996) (analyzing cases applying the requirement that an immigrant be "white" to naturalize).

15. *See generally* Keith Aoki, *No Right to Own?: The Early Twentieth Century "Alien Land Laws" as a Prelude to Internment*, 40 B.C. L. REV. 37 (1998) (analyzing the emergence of the land laws and their impacts).

16. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-12, at 330 (2d ed. 1988); *see also* John Hayakawa Torok, *Reconstruction and Racial Nativism: Chinese Immigrants and the Debates on the Thirteenth Fourteenth, and Fifteenth Amendments and Civil Rights Law*, 3 ASIAN L.J. 55 (1996) (analyzing how issues surrounding Chinese immigration and immigrants affected the debate over Reconstruction Amendments).

17. CONG. GLOBE, 39th Cong., 1st Sess. 1056 (1866) (Comments of Rep. Higby).

18. *Id.*

for the Chinese exclusion laws.[19] Moreover, Congress enacted the national exclusion laws with the support of Southerners interested in rejuvenating a racial caste system, as well as self-interested Anglos from California hoping to gain economically by the exclusion of the Chinese.[20]

The relationship between the treatment of African Americans and other racial minorities can be seen in a constitutional landmark of the nineteenth century. In his dissent in *Plessy v. Ferguson*, often lauded for its grand pronouncement that "[o]ur Constitution is color-blind,"[21] Justice Harlan noted the irony that the "separate but equal" doctrine applied to Blacks, who unquestionably were part of the political community, but not Chinese immigrants, "a race so different from our own that we do not permit those belonging to it to become citizens of the United States" and who generally were excluded from entering the country. Justice Harlan left no doubt about his sympathies:

> The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty.[22]

Although the Fourteenth Amendment promised much to African Americans, state-sanctioned segregation and discrimination flourished for nearly a century after its ratification. Thus, African Americans and Chinese immigrants ultimately both remained second-class members of U.S. society.

Japanese Internment and Brown v. Board of Education

The historical context of the infamous decision to intern Japanese Americans, as well as Japanese immigrants, during World War II sheds light on the relationship between the treatment of different minority groups in the United States. The Supreme Court ruling in *Korematsu v. United States*[23] shows how, absent the protection of law, disfavored racial minority citizens might be treated. In that infamous case, the Supreme Court rejected constitutional challenges to the mass detention in internment camps

19. *See* GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION 39-40 (1996).

20. *See* MILTON R. KONVITZ, THE ALIEN AND THE ASIATIC IN AMERICAN LAW 10-12 (1946).

21. 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). *See generally* Gabriel J. Chin, *The Plessy Myth: Justice Harlan and the Chinese Cases*, 82 IOWA L. REV. 151 (1996) (analyzing Justice Harlan's true commitment to racial equality).

22. Plessy v. Ferguson, 163 U.S. at 559 (Harlan, J., dissenting).

23. 323 U.S. 214 (1944). *See generally* ERIC K. YAMAMOTO ET AL., RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT (2001).

of U.S. citizens of Japanese ancestry, including some born and raised in this country.

As the Japanese suffered from internment during World War II, African Americans, in no small part due to increased labor demand during the war, saw improved employment prospects and efforts to reduce discrimination. The timing of the Supreme Court's decision in *Korematsu*, one of the most well-known equal protection cases of the twentieth century, should not be ignored. *Korematsu* (1944) is an infamous case, while *Brown v. Board of Education* (1954),[24] which vindicated the rights of African Americans, is much revered. Although relatively close in time, these cases reveal the very best and worst of American constitutional law. While persons of Japanese ancestry were rebuilding the remnants of their lives after the turmoil of legally sanctioned internment, African Americans saw hope—never fully realized—in being told that "separate but equal" was no longer the law of the land.

The National Origins Quota System

In 1924, Congress established the much-reviled national origins quota system, a formulaic device designed to ensure stability in the ethnic composition of the United States.[25] Specifically, the system served to prefer western and northern European immigrants. It initially permitted annual immigration of up to two percent of the number of foreign-born persons of a particular nationality in the United States as set forth in the 1890 census.[26] In operation, the quota system "materially favored immigrants from Northern and Western Europe because the great waves from Southern and Eastern Europe did not arrive until after 1890."[27] Congress enacted the quota system in the wake of passing the literacy test in 1917; this test excluded "[a]ll aliens over sixteen years of age, physically capable of reading, who cannot read the English language, or some other language or dialect, including Hebrew or Yiddish."[28] In operation, the test, as intended, restricted the immigration of non-English speakers, including Italians, Russians, Poles, Hungarians, Greeks, and Asians.[29]

As one commentator remarked approvingly in 1924, the national origins quota system was "a scientific plan for keeping

24. 347 U.S. 483 (1954).

25. *See* Immigration Act of 1924, ch. 190, § 11(a), 43 Stat. 153, 159 (repealed 1952).

26. *See id.*

27. Hiroshi Motomura, *Whose Alien Nation?: Two Models of Constitutional Immigration Law*, 94 MICH. L. REV. 1927, 1933 (1996) (book review) (footnote omitted).

28. Immigration Act of Feb. 5, 1917, ch. 29, § 3, 39 Stat. 874, 877 (repealed 1952).

29. *See* JOHN HIGHAM, STRANGERS IN THE LAND 300-30 (2d ed. 1992).

America American."[30] Implicit in this rationale, of course, was the view that persons of western and northern European stock were superior to other "races"[31] of people. In a similar vein, the conventional wisdom was that "[t]he real assimilation of aliens depends to a very large extent upon their associates after entering—'we can easily assimilate' them 'if their origins resemble the origins of the people they find when they get here.'"[32]

A heavy dose of anti-Semitism fueled the demand for the national origins quota system, with proponents hoping to limit the immigration of Jewish persons to the United States.[33] This mirrored the discrimination suffered by Jewish Americans in this country. During World War II, anti-Semitism, reinforced by the quota system, influenced the U.S. government's tragic refusal to accept many Jewish refugees fleeing the Holocaust, one of the tragedies of the twentieth century.[34]

Other "races" also were affected by the quota system. An oft-overlooked impact of the system was that it discouraged immigration from Africa, historically the source of precious little immigration to the United States. This is entirely consistent with anti-Black subordination in the country (despite the protections of the Fourteenth Amendment) and this nation's later refusal to accept refugees fleeing political turmoil in Haiti, a country populated primarily by persons of African ancestry.[35]

Despite persistent criticisms, including claims that it adversely

30. A. Warner Parker, *The Quota Provisions of the Immigration Act of 1924*, 18 AM. J. INT'L L. 737, 740 (1924).

31. The term "races" is employed in this essay with the understanding that they are socially constructed rather than biologically determined. *See* MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES (2d ed. 1994).

32. Parker, *supra* note 30, at 740.

33. *See generally* JOHN HIGHAM, SEND THESE TO ME: IMMIGRANTS IN URBAN AMERICA 81-174 (Johns Hopkins Univ. Press, rev. ed. 1984) (1975) (analyzing impact of anti-Semitism on immigration restrictions and discrimination against Jews in the United States).

34. *See* RITA J. SIMON & SUSAN H. ALEXANDER, THE AMBIVALENT WELCOME 31 (1993) (summarizing poll data indicating that, in 1939, vast majority of public opposed allowing large number of Jewish refugees from Germany into United States). *See generally* HENRY L. FEINGOLD, THE POLITICS OF RESCUE (1970) (analyzing the Roosevelt administration's response to Jewish refugees); SAUL S. FRIEDMAN, NO HAVEN FOR THE OPPRESSED (1973) (studying U.S. refugee policy toward Jewish refugees during World War II); GORDON THOMAS & MAX MORGAN WITTS, VOYAGE OF THE DAMNED (1974) (documenting U.S. government's refusal to accept Jewish refugees on the SS *St. Louis* during World War II and forcing the ship to return to Nazi Germany).

35. *See* Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155 (1993); *infra* text accompanying notes 57-68. *See generally* Kevin R. Johnson, *Judicial Acquiescence to the Executive Branch's Pursuit of Foreign Policy and Domestic Agendas in Immigration Matters: The Case of the Haitian Asylum-Seekers*, 7 GEO. IMMIGR. L.J. 1 (1993) (analyzing genesis of Haitian interdiction and repatriation policy).

affected U.S. foreign policy interests, the Anglo-Saxon, northern European preference in the immigration laws remained intact until 1965. The law adversely affected a wide array of racialized peoples, even those—southern and eastern European—that we today would classify as "white."

Modern Racial Exclusion

In the wake of the Civil Rights Act of 1964, Congress passed the Immigration Act of 1965.[36] This new law abolished the national origins quota system and barred racial considerations from expressly entering into decisions about immigrant visas; it also imposed for the first time a ceiling (120,000) on migration from the Western Hemisphere. Immigration from the Western Hemisphere previously had been restricted not through quotas but with vigorous enforcement of the exclusion and deportation grounds. The limitation on Western Hemisphere immigration, which Congress later repealed, was part of a compromise to those who feared a drastic upswing in Latin American immigration due to the liberalizing features of the 1965 law. Consequently, Congress coupled more generous treatment of those outside the Western Hemisphere with less generous treatment of immigrants from Latin America.[37]

With the demise of the quota system, the racial demographics of the immigration stream to the United States changed dramatically. Increasing numbers of immigrants of color, especially from Asia and Latin America, came to the United States.[38] Predictably, concern with immigration, particularly the race of the immigrants, has grown over the decades.

Importantly, the abolition of the national origins quota system,

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36. Pub. L. No. 89-236, 79 Stat. 911 (1965).

37. *See* Motomura, *supra* note 27, at 1934. The blue ribbon Select Commission on Immigration and Refugee Policy summarized the history:

> The United States was . . . far from free of prejudice . . . and one part of the 1965 law reflected change in policy that was in part due to antiforeign sentiments. Prejudice against dark-skinned people . . . remained strong. *In the years after World War II, as the proportion of Spanish-speaking residents increased, much of the lingering nativism in the United States was directed against those from Mexico and Central and South America . . . . Giving in to . . . pressures as a price to be paid for abolishing the national origins system, Congress put into the 1965 amendments a ceiling [on Western Hemisphere immigration] to close the last remaining open door of U.S. policy.*

U.S. SELECT COMM'N ON IMMIGRATION AND REFUGEE POLICY, STAFF REPORT: U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST 208 (1981) (emphasis added) (footnote omitted).

38. *See* U.S. DEP'T OF JUSTICE, 2000 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 19-21 (2002) (Table 2) (compiling statistical data on immigration by region and selected countries from 1820-2000).

although removing blatant discrimination from the immigration laws, failed to remove all remnants of racism. Various provisions of the modern immigration laws disparately impact noncitizens of color from developing nations, as well as U.S. citizens of similar ancestries. The 1965 Act replaced the quota system with an across-the-board annual limit on the number of immigrants from each nation.[39] This ceiling creates lengthy lines for immigrants from developing nations, such as China, Mexico, the Philippines, and India, and relatively short lines, if any, for people from most other nations. For example, prospective immigrants from Mexico can be required to wait for years longer than similarly situated persons from most other nations for certain immigrant visas.[40]

Other changes to the immigration laws reflect racial concerns. The much-lauded Refugee Act of 1980[41] for the very first time created a general right to apply for asylum in the United States for noncitizens fleeing political and related persecution in their homelands. The Act, however, was motivated in part by a desire to limit the number of Vietnamese refugees coming to the United States, whom the President had admitted liberally after the fall of Saigon in 1975. The law established numerical limits on refugee admissions and generally restricted the power of the President to admit refugees, with the hope of preventing future "mass" migrations.[42]

Although generally characterized as "pro-immigrant," the Immigration Act of 1990 reflects congressional concerns with the racial composition of the immigrant stream.[43] The law created a new immigrant visa program that effectively represents affirmative action for white immigrants, a group that benefited from preferential treatment under the national origins quota system until 1965. Congress, in an ironic twist of political jargon, established the "diversity" visa program, which prefers immigrants from nations populated primarily by white people. As congressional proponents envisioned, many Irish have immigrated under the program. Indeed, a transitional program required that forty percent of the

39. *See* Immigration Act of 1965, Pub. L. No. 89-236, § 2, 79 Stat. 911, 911-12 (codified as amended at Immigration and Nationality Act of 1952 (INA) § 202(a), 8 U.S.C.A. § 1152(a) (West Supp. 2003)). The per-country quotas were not extended to nations in the Western Hemisphere until 1976. INA Amendments of 1976, Pub. L. No. 94-571, § 2, 90 Stat. 2703, 2703 (codified as amended at INA § 201(a), 8 U.S.C.A. § 1151(a)).

40. *See* Bernard Trujillo, *Immigrant Visa Distribution: The Case of Mexico*, 2000 WIS. L. REV. 713.

41. Pub. L. No. 96-212, 94 Stat. 102 (1980).

42. *See* Harvey Gee, *The Refugee Burden: A Closer Look at the Refugee Act of 1980*, 26 N.C. J. INT'L & COM. REG. 559 (2001).

43. Pub. L. No. 101-649, 104 Stat. 4978 (1990).

diversity visas would be issued to Irish immigrants.[44]

The War on "Illegal Aliens" a.k.a. Mexican Immigrants

One cannot fully appreciate the current debate over undocumented immigration in the United States without understanding how it fits into a long history. Especially in the Southwest, the immigration laws have helped ensure a disposable labor force for U.S. business interests. For example, during the Great Depression when the supply of unskilled labor dwarfed demand and the welfare rolls expanded, Mexican immigrants, as well as citizens of Mexican ancestry, were "repatriated" to Mexico at the behest of governmental authorities.[45] Later, under the Bracero Program in the 1940s and 1950s, an estimated one million Mexican workers were temporarily admitted into the country to work in agriculture.[46]

Despite the fact that undocumented persons come from nations all over the world, the near exclusive focus of governmental and public attention at the turn of the century was on undocumented immigration from Mexico. The racial impact of the recent push to crack down on "illegal aliens" is unmistakable. Well-publicized border enforcement operations, little different from military operations, in El Paso, Texas (Operation Blockade, later renamed Operation Hold the Line due to protests from the Mexican government) and San Diego, California (Operation Gatekeeper) have been aimed at sealing the U.S.-Mexico border and keeping undocumented Mexican citizens from entering the United States.[47]

U.S. military forces have assisted the Immigration & Naturalization Service (INS) in policing the border. At the same time, reported abuses against Mexican nationals along the border continue. For example, in 1997, a U.S. Marine on patrol shot and killed a teenager, Esequiel Hernandez, Jr. (a U.S. citizen with no criminal record) while he was herding his family's goats near the border.[48] Moreover, forced by the new operations in major border

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44. *See* STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 235-38 (3d ed. 2002) (explaining origins and impacts of diversity visa program).

45. *See* FRANCISCO E. BALDERRAMA & RAYMOND RODRIGUEZ, DECADE OF BETRAYAL: MEXICAN REPATRIATION IN THE 1930S, at 98-99 (1995) (analyzing and criticizing "repatriation" of persons of Mexican ancestry during Great Depression).

46. *See* KITTY CALAVITA, INSIDE THE STATE 218 (1992) (analyzing and criticizing U.S. government's role in the program of ensuring control over Mexican labor).

47. *See generally* TIMOTHY J. DUNN, THE MILITARIZATION OF THE U.S.-MEXICO BORDER, 1978-1992 (1996) (documenting increased militarization of border enforcement during the 1990s).

48. *See* Sam Howe Verhovek, *After Marine on Patrol Kills a Teen-Ager, A Texas Border Village Wonders Why*, N.Y. TIMES, June 29, 1997, sec. 1, at 16.

cities to try to enter the United States through more isolated, dangerous locales, hundreds of migrants now die each year in the journey to the north.[49] The U.S. General Accounting Office found that, despite the border enforcement build-up and the loss of life, the evidence was inconclusive about whether the new strategy had in fact deterred undocumented migration.[50] Indeed, some informed observers have concluded that the number of undocumented immigrants has increased with the new border enforcement operations, in part because once in the country, undocumented immigrants are less likely to return home for fear of again hazarding the border crossing.[51]

Public concern with undocumented Mexican immigration grew as the media publicized the significant growth in the "Hispanic" population in the United States.[52] The Mexican American community has resisted anti-immigrant, anti-Mexican sentiment. Similar to the often-heated debate over language regulation, bilingual education, and crime, immigration restrictionist proposals have become another battlefield for Anglos and Mexican Americans to fight for status in the U.S. social hierarchy.[53]

In addition, Mexican Americans, and Latina/os generally, have a self-interest in fighting overzealous border enforcement. In the fervor to locate and deport undocumented Mexican citizens, Mexican Americans, often stereotyped as "foreigners" by the national community, may fall within the enforcement net. In the infamous deportation campaign known as "Operation Wetback" in 1954, for example, "[t]he Mexican American community was affected because the campaign was aimed at only one racial group, which meant that the burden of proving one's citizenship fell totally upon people of Mexican descent. Those unable to present such proof were arrested and returned to Mexico."[54] Similarly, evidence suggests that provisions of the immigration laws that allow for the imposition of sanctions on those who employ undocumented

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49. *See* Bill Ong Hing, *The Dark Side of Operation Gatekeeper*, 7 U.C. DAVIS J. INT'L L. & POL'Y 121 (2001); Jorge A. Vargas, *U.S. Border Patrol Abuses, Undocumented Mexican Workers and International Human Rights* 2 SAN DIEGO INT'L L.J. 1 (2001).

50. *See* U.S. GEN. ACCOUNTING OFFICE, ILLEGAL IMMIGRATION: SOUTHWEST BORDER STRATEGY RESULTS INCONCLUSIVE; MORE EVALUATION NEEDED (1997).

51. *See* BELINDA I. REYES, HANS P. JOHNSON, & RICHARD VAN SWEARINGEN, HOLDING THE LINE? THE EFFECT OF THE RECENT BORDER BUILD-UP ON UNAUTHORIZED IMMIGRATION (Public Policy Institute of California, 2002).

52. *See* Lynette Clemetson, *Hispanics Now Largest Minority, Census Shows*, N.Y. TIMES, Jan. 22, 2003, at A6.

53. *Cf.* Rachel F. Moran, *Bilingual Education as Status Conflict*, 75 CAL. L. REV. 321 (1987) (analyzing how debate over bilingual education in public schools had escalated into conflict for status between Anglos and Latina/os).

54. GARCÍA, *supra* note 4, at 230-31.

persons, have resulted in "'a serious pattern of discrimination'" by employers against persons of Latin American, as well as Asian, ancestry.[55]

The historical relationship between the subordination of Mexican Americans, a "foreign" minority, and African Americans, viewed as a domestic minority, reveals much about the fragility of civil rights in the United States. During the New Deal, while the government scrambled to help citizens and provided public benefits to citizens who satisfied eligibility requirements, Mexican American citizens as well as Mexican immigrants were deported to Mexico. In 1954, the same year that the Supreme Court handed down the much-lauded *Brown v. Board of Education*[56] decision, the U.S. government commenced "Operation Wetback." Ironically, the war on Mexican immigrants, as well as Mexican American citizens, raged at the same time that the formal legal rights of African Americans, which remain to be fully realized, were finally being recognized. At that time, it was far from clear that the Equal Protection Clause of the Fourteenth Amendment on which *Brown* rested even protected Mexican Americans.

Asylum, Haitian Interdiction, and the Politics of Race

U.S. law and policy toward noncitizens who have fled civil war, political and other persecution, and genocide in their native lands historically have been influenced by nativism and racism. Domestic anti-Semitism, for example, unfortunately contributed to the Roosevelt administration's decision to turn its back on Jewish refugees fleeing the horrors of Nazi Germany.[57] Congress passed the Refugee Act of 1980, among more humanitarian purposes, with the hope of reducing the number of refugees that the President admitted from Vietnam.[58]

It has not only been race, however, that has influenced U.S. refugee and asylum policy. Persons from China and Cuba, for example, in the latter half of the twentieth century received generous treatment from the U.S. government in no small part due to foreign policy concerns, namely that the U.S. government was at odds with the communist Chinese and Cuban governments; admitting refugees from China and Cuba implicitly condemned the governments of those nations. The United States generally denied asylum to Central Americans fleeing U.S. allies with abominable

55. *See* U.S. GEN. ACCOUNTING OFFICE, IMMIGRATION REFORM: EMPLOYER SANCTIONS AND THE QUESTION OF DISCRIMINATION 5-6 (1990).

56. 347 U.S. 483 (1954).

57. *See supra* text accompanying notes 33-34.

58. *See supra* text accompanying notes 41-42.

human rights records, while liberally granting relief to Poles fleeing a harsh but less deadly communist government at odds with our own.[59]

Policy conflicts occasionally resulted in confused and inconsistent U.S. policies. For example, the treatment of Chinese refugees, including many claiming persecution based on violation of China's "one-child" rule, was erratic at best until Congress intervened.[60] This results from the fact that, while foreign policy interests favored liberal admissions (and thus implicit condemnation of China's communist government), domestic fears militated in favor of numerical limits. The U.S. government initially showed sympathy for Chinese refugees. However, fearing a large-scale migration from China in the 1990s, the Executive Branch began to detain all Chinese migrants who came to the United States on ships, including the much-publicized Golden Venture in 1993, and to interdict Chinese ships outside U.S. territorial waters before they reached the mainland.[61]

Despite the fluctuations in policy, the U.S. government not infrequently goes to extraordinary lengths to halt feared mass migrations of people of color. It has implemented special detention policies directed at Central Americans and made concerted efforts to encourage potential asylum applicants to forego their claims and "voluntarily" depart the country.[62] No other U.S. policy approached, however, the government's extraordinary treatment of Black persons fleeing the political violence in Haiti. An oft-ignored fact is that "U.S. immigration policy toward Haiti may harm a historically disadvantaged group—namely, black Americans,"[63] by stigmatizing African American citizens.

After the military coup toppled the democratically elected government in September 1991, the Bush administration imposed economic sanctions on Haiti and suspended interdiction of Haitians on boats trying to come to the United States; in November 1991,

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59. *See generally* Kevin R. Johnson, *A "Hard Look" at the Executive Branch's Asylum Decisions*, 1991 UTAH L. REV. 279 (analyzing pattern of foreign policy and other bias in U.S. government's asylum decisions).

60. *See* Di v. Carroll, 842 F. Supp. 858, 866-67 (E.D. Va. 1994) (tracing inconsistency in U.S. government's treatment of Chinese noncitizens fleeing one-child rule), *rev'd without opinion*, 66 F.3d 315 (4th Cir. 1995). Congress amended the law in 1996 to expressly state that such persons are eligible for relief. *See* IIRIRA, Pub. L. No. 104-208, § 601(a)(1), 110 Stat. 3009, 3689 (1996) (amending Immigration & Nationality Act § 101(a)(42), 8 U.S.C. § 1101(a)(42)).

61. *See* Jan C. Ting, *"Other Than a Chinaman": How U.S. Immigration Law Resulted and Still Reflects a Policy of Excluding and Restricting Asian Immigration*, 4 TEMP. POL. & CIV. RTS. L. REV. 301, 310-11 (1995).

62. *See, e.g.*, Orantes-Hernandez v. Thornburgh, 919 F.2d 549 (9th Cir. 1990).

63. Motomura, *supra* note 27, at 1950.

interdiction recommenced. As a result of the coup, "'hundreds of Haitians [were] killed, tortured, detained without a warrant, or subjected to violence and the destruction of their property because of their political beliefs. Thousands [were] forced into hiding.'"[64] In the six months after October 1991, the Coast Guard halted over 34,000 Haitians on the high seas, which exceeded the number interdicted during the previous decade.[65]

To stop the flow of refugees, President Bush in May 1992 began immediately repatriating all Haitians without screening to determine whether they might be eligible to remain in the United States. Despite campaign promises to the contrary, President Clinton continued Haitian interdiction and repatriation and forcefully defended the policy against legal challenge.[66]

The Supreme Court ultimately upheld the Executive Branch's unprecedented Haitian repatriation policy.[67] The Court did so without squarely addressing the claim made in an *amici curiae* brief of the NAACP, TransAfrica, and the Congressional Black Caucus that the policy was discriminatory and that the Haitians were subject to "separate and unequal" treatment.[68]

Lessons from the Immigration Laws for Domestic Minorities

Immigration law offers an invaluable gauge for measuring this nation's racial sensibilities. Long a fixture of immigration law, the plenary power doctrine, a judicially created immunity for substantive immigration decisions, emphasizes that the Legislative and Executive Branches of the U.S. government possess "plenary power" over immigration matters and that little, if any, room exists for judicial review. Although consistently criticized, and arguably narrowed by the Supreme Court, the doctrine continues to represent the law of the land. In this important way, immigration law has been, and remains to some extent, estranged from traditional public law, where the Constitution operates in full force. Consequently, the U.S. government can treat immigrants without legal constraints. As we have seen, race has deeply influenced the government's immigration laws and policies.

Racial Exclusions in the Immigration Laws Reinforce the Subordinated

64. Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 162 (1993) (citation omitted).

65. *See id.* at 163.

66. *See* Elaine Sciolino, *Clinton Says U.S. Will Continue Ban on Haitian Exodus*, N.Y. TIMES, Jan. 15, 1993, at A1.

67. *See* Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155 (1993).

68. *See* Brief of the National Association for the Advancement of Colored People, TransAfrica, and the Congressional Black Caucus as Amici Curiae in Support of Respondents, Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155 (1993) (No. 92-344).

Status of Minority Citizens in the United States

Until 1965, the U.S. immigration laws included express racial exclusions and today disparately affect certain racial and national origin groups. Gerald Rosberg focuses on the damage to U.S. citizens sharing the race or national origin of groups barred from joining the national community:

> [A racial or national origin] classification would . . . require strict scrutiny, not because of the injury to the aliens denied admission, but rather because of the injury to American citizens of the same race or national origin who are stigmatized by the classification. When Congress declares that aliens of Chinese or Irish or Polish origin are excludable on the grounds of ancestry alone, it fixes a badge of opprobrium on citizens of the same ancestry. . . . Except when necessary to protect a compelling interest, Congress cannot implement a policy that has the effect of labeling some group of citizens as inferior to others because of their race or national origin.[69]

Express or covert racial exclusion of noncitizens under the immigration laws reveals to domestic minorities how they are viewed by society. The unprecedented operations designed to seal the U.S.-Mexico border combined with ramped-up efforts to deport undocumented Mexicans, for example, tell much about how a majority of society views Mexican Americans and suggests to what lengths society might go, if permitted under color of law, to rid itself of domestic Mexican Americans. Indeed, during the New Deal and "Operation Wetback" of 1954, Mexican American citizens, as well as Mexican immigrants, were "repatriated" to Mexico.[70] It therefore is no surprise that the organized Mexican American community consistently resists the harsh attacks on immigration and immigrants. This is true despite the desire of some Mexican Americans to restrict immigration because of perceived competition with immigrants in the job market.[71]

For similar reasons, African American activist organizations protested when the U.S. government turned a cold shoulder to poor Haitian refugees facing death from the political violence gripping Haiti. Asian American activist groups criticized the treatment of Chinese immigrants in the 1990s, as well as anti-immigrant sentiment and welfare reforms that adversely affected the Asian immigrant community. These minority groups implicitly

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69. Gerald M. Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 SUP. CT. REV. 275, 327.

70. *See supra* notes 4, 45 (citing authority).

71. *See generally* DAVID G. GUTIÉRREZ, WALLS AND MIRRORS: MEXICAN AMERICANS, MEXICAN IMMIGRANTS, AND THE POLITICS OF ETHNICITY (1995) (analyzing ambivalence in Mexican American community about immigration from Mexico).

understand the link between racial exclusions and their place in the U.S. racial hierarchy. It is not just that they share a common ancestry with certain immigrant groups, although that no doubt plays some role in the formation of political support. These communities instead understand that animosity toward members of immigrant minority communities is not limited to immigrants. In this way, immigration law has proven to be an indicator of social status of people of color in the United States.

The Implications for Immigration and Civil Rights in these "Uncivil Times"

As Sharon Hom and Eric Yamamoto have aptly observed, these are "uncivil times" for civil rights in the United States:

> Despite entrenched group economic disparities, strident and sometimes virulent political campaigns have succeeded in legally banning affirmative action, cutting off the rights of immigrants and their children, barring bilingual education, prohibiting gay marriage, and paring down welfare benefits. The current Supreme Court also has sharply limited the reach of civil rights laws, except in cases in which whites claim "reverse discrimination," dissociating law from many communities' sense of justice.[72]

The "uncivil" nature of the times has become readily apparent after the horrible events of September 11, 2001. In the name of fighting terrorism, the government has taken aggressive steps toward Arabs and Muslims, and more generally the immigrant community as a whole.[73] Immigrants from Mexico have suffered as the federal government has sought to seal the borders.[74] Civil rights generally have been sacrificed to national security. Indeed, with the expansive surveillance powers afforded to the federal government under the USA PATRIOT Act,[75] the rights of citizens as well as

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72. Sharon K. Hom & Eric Yamamoto, *Collective Memory, History, and Social Justice*, 47 UCLA L. REV. 1747, 1750 (2000).

73. *See* Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURVEY AM. L. 295 (2002); Sameer M. Ashar, *Immigration Enforcement and Subordination: The Consequences of Racial Profiling After September 11*, 34 CONN. L. REV. 1185 (2002); David Cole, *Enemy Aliens*, 54 STAN. L. REV. 853 (2002); Bill Ong Hing, *Vigilante Racism: The De-Americanization of Immigrant America*, 7 MICH. J. RACE & L. 441 (2002); Thomas W. Joo, *Presumed Disloyal: Wen Ho Lee, War on Terrorism and Construction of Race*, 34 COLUM. HUM. RTS. L. REV. 1 (2002); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575 (2002).

74. *See* Kevin R. Johnson, *September 11 and Mexican Immigrants: Collateral Damage Comes Home*, 52 DEPAUL L. REV. 849 (2003).

75. *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272, 278-96, 350-52. In addition, as part of the "war on terror," at

noncitizens have been curtailed.

The daunting question facing advocates for social justice is how to most effectively resist the onslaught. As this discussion hopefully shows, the civil rights of various minority groups—both "domestic" and "foreign"—often have been linked throughout U.S. history. The exclusion of immigrants sharing a common ancestry under the immigration laws reveals the subordinated status of domestic minorities. As this essay has demonstrated, persons of African, Asian, and Latin American ancestry have suffered from the enforcement of the immigration laws. In addition, ostensible improvements in the law for some domestic minorities have frequently been combined with harsh treatment of immigrant communities in the United States and potential immigrants of color from the developing world.

This unfortunate history strongly suggests the need for the formation of multiracial political coalitions in efforts to secure "interracial justice."[76] Otherwise, the "divide-and-conquer" strategy will prevail. Ostensible legal benefits will be bestowed on certain groups while denied others. Moreover, purported gains by some communities of color have repeatedly proven to be illusory. The formal legal protections bestowed on African Americans over the course of U.S. history at times when immigrants of color suffered, have more often than not failed to offer actual material benefits. The most famous example perhaps is *Brown v. Board of Education*,[77] which declared legally enforced segregation in the public schools unlawful, but has failed to satisfy its promise; the public schools today remain segregated, in no small part due to confluence of the desire for local schools in a sea of rampant residential segregation.[78]

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least two U.S. citizens have been held as "enemy combatants" without being charged with a crime or being allowed access to an attorney. *See* Hamdi v. United States, 296 F.3d 278 (4th Cir. 2002) (addressing claims of U.S. citizen labeled an "enemy combatant," detained indefinitely without charges, and denied access to counsel); Padilla v. Bush, 243 F. Supp. 2d 42 (S.D.N.Y. 2003) (finding unlawful U.S. government's denial of access of to attorney to a U.S. citizen who had converted to Islam and, after his arrest in the United States, was labeled an "enemy combatant" by the U.S. government and held without being charged with a crime).

76. *See* Eric K. Yamamoto, Interracial Justice: Conflict in Post-Civil Rights America (1999).

77. 347 U.S. 483 (1954).

78. *See generally* Douglas S. Massey & Nancy A. Denton, American Apartheid (1993) (analyzing widespread housing segregation in United States).

79. *See* Charles R. Lawrence III, *Race, Multiculturalism, and the Jurisprudence of Transformation*, 47 STAN. L. REV. 819 (1995).

80. *See* Kevin R. Johnson, *Racial Hierarchy, Asian Americans and Latinos as "Foreigners" and Social Change: Is Law the Way to Go?*, 76 OR. L. REV. 347, 352-58 (1997) (examining potential areas of common interests of Asian Americans and Latina/os); Kevin R. Johnson, *The Case for African American and Latina/o Cooperation in Challenging Race*

Multiracial alliances for justice can vastly improve the chances for meaningful change.[79] First, such coalitions can work politically to promote social transformation. Second, and just as important as a practical matter, political coalitions can help to enforce any legal rights successfully secured. Thus, besides helping gain recognition of legal rights, political mobilization and coalition create an essential enforcement mechanism to ensure respect for those rights.

Alliances between and among minority groups is feasible and necessary in many circumstances. Different minority groups frequently share common interests.[80] Issue-oriented coalitions are necessary and possible. Of course, the formation of political alliances will prove to be difficult. Tensions between communities of color, however, must be overcome if we hope to improve the place of all in U.S. society.

Conclusion

This essay traces the historical relationship between subordination of domestic minorities and noncitizen minorities. Because racial subordination is part of a cohesive whole, it cannot be fully appreciated by focusing on one aspect in isolation of the dynamic social context. Activists must strive to understand various complex relationships in order to secure lasting change.

The relationship between different forms of subordination suggests the need to build coalitions between subordinated communities seeking change. In the past, conflict between different minority groups—be it, for example, between Blacks and Latina/os, or African Americans and Asian Americans—has hindered the building of coalitions necessary to dismantle the entrenched racial hierarchy. Such conflict thus has contributed to the maintenance of the status quo.

But, if change is not forthcoming, what is one to extrapolate from the past in predicting the future? We can expect crackdowns on immigrants of color when domestic racial minorities experience minimal improvements. Foreigners, like sacrifices to the gods, are the price for domestic minorities to achieve marginal, often illusory, improvements in their plight. The resulting psychological dynamics work to buttress the status quo and ensure maintenance of the racial hierarchy in the United States.

For better or worse, the history of racial exclusion in U.S. immigration laws serves as a lens into this nation's soul. By considering the people that a society seeks to exclude from the

Profiling in Law Enforcement, 55 FLA. L. REV. 341 (2002) (contending that African Americans and Latina/os share common concerns and goals in seeking to end face profiling in law enforcement).

national community, we better understand how that society views citizens who share common characteristics with the excluded group. This phenomenon is not limited to racial minorities, but applies with equal force to other groups who have been excluded from our shores under the immigration laws, including political minorities, the poor, women, lesbians, and gay men. Disadvantaged in the United States means more disadvantaged under the immigration laws.

Unfortunate as it may be, uncivil times for civil rights has been a recurrent theme in U.S. history. Ebbs and flows of racism and nativism have deeply affected racial and other minorities in this country. Importantly, in the struggle for social justice, minority groups must appreciate the relationship between the various subordinations. Backlashes against the groups often are related in a complex matrix. To change that dynamic, political alliances, fragile and difficult as they may be, are essential.